1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SOLARBRIDGE TECHNOLOGIES, INC., a Delaware Corporation Plaintiff, v. ISAAC OZKAYNAK, an individual, DEFENDANT.	Case No. C 10-cv-03769-EJD **ORDER FOR FURTHER BRIEFING**

Presently before the Court is Plaintiff's Motion for Default Judgment. See, Dkt. No. 33. As part of their Motion, Plaintiff argued claims under the Computer Fraud and Abuse Act ('CFAA'), 18 U.S.C. § 1030. Those claims, amongst others, provide the predicate for Plaintiff's Motion for Default Judgment.

On April 10, 2012 the Ninth Circuit (*en banc*) decided U.S. v. Nosal, No. 10-10038, 2012 WL 1176119 (9th Cir.2012). There, the court interpreted the phrase "exceeds authorized access" within the meaning of CFAA. The court held that the phrase "does not extend to violations of use restrictions." Nosal, 2012 WL 1176119 at*7. The court said that "if Congress wants to incorporate misappropriation liability into the CFAA, it must speak more clearly." Id. The decision reversed U.S. v. Nosal, 642 F.3d 781, 785 (9th Cir.2011) – being a 2:1 decision that broadly interpreted the phrase: "exceeds authorized access" to include employer use restrictions.

The *en banc* court reasoned that its interpretation was a more "sensible reading of the text and legislative history of a statute whose general purpose is to punish *hacking* – the circumvention of technological access barriers – not misappropriation of trade secrets – a subject Congress has dealt with elsewhere." Nosal, 2012 WL 1176119 at*7. To reinforce its holding, the court cited a growing number of recent cases – in the civil action context – which allow for compensatory damages and injunctive relief as permitted by 18 U.S.C. § 1030(g). The cited cases, include:

Case No. C 10-cv-03769-EJD
ORDER FOR FURTHER BRIEFING

1   Shamrock Foods Co. v. Gast, 535 F. Supp. 2d 962, 965 (D. Ariz. 2008)); Orbit One Commc'ns,

2   Inc. v. Numerex Corp., 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010); Diamond Power Int'l, Inc. v.

3   Davidson, 540 F. Supp. 2d 1322, 1343 (N.D. Ga. 2007); Int'l Ass'n of Machinists & Aerospace

4   Workers v. Werner-Masuda, 390 F. Supp. 2d 479, 499 (D. Md. 2005).

5   　　　In the present case, the date for filing the Parties' Motions for Default Judgment was prior

6   to the opinion in Nosal. Neither of the Parties have had opportunity to present argument addressing

7   the impact of that decision on this case. As such, this Court is interested in understanding what

8   affect, if any, the *en banc* court's decision has on:

9   　　　(a) Plaintiff's claims under the CFAA – including each of the CFAA sections referred to in

10 Plaintiff's Motion for Default Judgment. See, Dkt. No. 33;

11 　　　(b) Plaintiff's argument with respect to the discretionary factors stated in Eitel v. McCool,

12 782 F.2d 1470, 1471–72 (9th Cir.1986) – specifically those factors addressing i) the merits of the

13 claim and ii) the sufficiency of the complaint;

14 　　　(c) Plaintiff's Amended Complaint. See, Dkt. No. 16, and whether the Court should grant

15 an order to provide for further amendment (if any) to accord with the new interpretation of the

16 CFAA – and, to specify the date upon which the Defendant "exceeded authorization" in accessing

17 the "computers and servers in order to disclose confidential material….without [Plaintiff's] prior

18 consent." See, Dkt. No. 16 ¶ 25; and

19 　　　(d) Plaintiff's argument with respect to Defendant's alleged violations of California Penal

20 Code Section 502(c),[1] which is based on similar arguments to its claims under the CFAA.[2]

---

21 [1] Plaintiff's brief states: "SolarBridge has also established that Defendant violated California Penal
22 Code Section 502. Section 502, like the CFAA, prohibits the unauthorized access of a protected
    computer and creates civil cause of action." See, Plaintiff's Motion for Default Judgment, Dkt. No.
23 33 at page 13.

24 　　　With respect to this argument, the Court is mindful of what was said in Chrisman v. City of
    Los Angeles, 155 Cal. App. 4th 29, 32 (Cal. Ct. App. 2007). In Chrisman, the court found that a
25 police officer did not violate Section 502 when, while on duty, the officer "accessed the
    Department computer system [] for non-duty-related activities." 155 Cal. App. 4th at 32. Chrisman
26 also cited: People v. Gentry (1991) 234 Cal.App.3d 131, 285 Cal.Rptr. 591, which explained: "One
    of the legislative purposes of Penal Code section 502 was 'to deter and punish...browsers and
27 *hackers*—outsiders who break into a computer system to obtain or alter the information contained
    therein." (Gentry, at p. 141, fn. 8, 285 Cal.Rptr. 591.)"

28

2

Case No. C 10-cv-03769-EJD
ORDER FOR FURTHER BRIEFING

1   While the Court notes that <u>Nosal</u> was set within a criminal context, the court cited several

2 cases – set within the civil action context – to support its reasoning. See, <u>Nosal</u>, 2012 WL 1176119

3 at*7. In the Court's view, discussion of those cases in additional briefing could be relevant to the

4 disposition of this case.

5   Accordingly, the court orders as follows:

6   1.   Plaintiff shall file an additional brief addressing the issues discussed herein no later

7 than May 4, 2012. The brief filed pursuant to this Order shall not exceed twelve (12) pages in

8 length.

9   2.   The hearing schedule for April 20, 2012 is continued to May 11, 2012 at 9:00am.

10

11 **IT IS SO ORDERED.**

12 Dated: April 18, 2012

13   _____

14   EDWARD J. DAVILA
     United States District Judge

15

16

17

18

19

20

---

21 [2] The Court also observes what was recently said by a federal district court – citing <u>Chrisman</u>, 155 Cal. App. 4th 29 – with respect to Section 502:

22   Although cases interpreting the scope of liability under the CFAA do not govern the
23   Court's analysis of the scope of liability under Section 502, CFAA cases can be instructive.
     EFF points to several CFAA cases for the proposition that the CFAA prohibits trespass and
     theft, not mere violations of terms of use. See, e.g., LVRC Holdings LLC v. Brekka, 581
24   F.3d 1127, 1130 (9th Cir.2009) ("[F]or purposes of the CFAA, when an employer
     authorizes an employee to use a company computer subject to certain limitations, the
25   employee remains authorized to use the computer even if the employee violates those
     limitations."); Diamond Power Int'l, Inc. v. Davidson, 540 F.Supp.2d 1322 (N.D.Ga.2007)
26   ("Under the more reasoned view, a violation for accessing 'without authorization' occurs
     only where initial access is not permitted.").

27 See,Facebook, Inc. v. Power Ventures, Inc., No. C 08–05870–JW, 2010 U.S. Dist. LEXIS 93517,
28 at *9, 2010 WL 3291750 (N.D.Cal. July 20, 2010).

3

Case No. C 10-cv-03769-EJD
ORDER FOR FURTHER BRIEFING